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IN THE UNITED STATES PATENT OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

IN RE APPLICATION OF:)
)
DAN PHARO, ET AL.)
)
SERIAL NO.: 10/633,480)
) GROUP ART UNIT NO. 2859
FILED: AUGUST 1, 2003)
)
TITLE: PERSONNEL GUIDANCE)
AND LOCATION CONTROL)
SYSTEM)
)
EXAMINER: R. ALEXANDER SMITH)

APPEAL BRIEF

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Commissioner for Patents
P.O. Box 1450
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Sir:

I.

INTRODUCTION

This Appeal is based on a Final Rejection of the Examiner dated October 20, 2004, in which the Examiner rejected all of the claims in the application, namely, claims 1-9 and 22-32, both under 35 USC 112, and 35 USC 102/35 USC 103. Objections were also advanced to Claims 31 and 32. The claims were provisionally rejected on the ground of double patenting.



Daniel Pharo, et al.
Serial No. 10/633,480

II.

REAL PARTY IN INTEREST

The real parties in interest in this application and the subject matter of this application are the inventors, namely, Daniel Pharo and Alex J. Hembree, as well as a California corporation owned substantially by the two of them, known as Next Systems, Inc.

For purposes of this appeal, since the corporation is essentially owned, for all real purposes, by the two inventors, they are the real parties in interest.

III.

RELATED APPEALS AND INTERFERENCES

The application on appeal herein is closely related to the following two U.S. patent applications containing very similar subject matter, and which are also contemporaneously on appeal herewith.

<u>Serial No.</u>	<u>Filing Date</u>	<u>Title</u>
90/758,934	January 11, 2001	Personnel Guidance and Location Control System

Daniel Pharo, et al.
Serial No. 10/633,480

10/635,871

August 5, 2003

Personnel
Location
Control System
with
Informational
Message
Presentation

IV.

STATUS OF THE CLAIMS

- 1) Claims 1-9 and 22-32 are pending in the application.
- 2) Claims 31 and 32 were objected to because of alleged informalities.
- 3) Claims 1-9 and 22-31 were rejected under 35 USC 112.
- 4) All of the claims in the application were rejected under 35 USC 103(a), as being unpatentable over U.S. patent No. 5,637,378 to Hensler et al. in view of the Chen patent No. 5,775,016 and the Gehweiler patent No. 3,453,660, and the Phillips patent, and U.S. patent No. 2,680,698 to Schnee.
- 5) The claims in the application were also rejected on the basis of double patenting.

V.

STATUS OF AMENDMENTS

An amendment, identified as "Amendment C" was mailed to the U.S. Patent and Trademark Office on April 20, 2005. That Amendment was after the Final Rejection, but entry thereof was denied in an Office Action dated May 6, 2005. Thus, the claims in issue are those presented in the applicant's Amendment C. The claims in applicant's Amendment C are the same claims identified in paragraph I. of this Brief and are the claims which are present on Appeal.

VI.

SUMMARY OF THE INVENTION

A personnel guidance and location control system for guiding a group of walking pedestrian individuals into a line in order to control movement of the pedestrian individuals while they advance toward an end-of-the-line position and usually a destination in advance of, or beyond, that end-of-the-line position. In this case, the control system is highly effective in controlling the movement of a large number of people in a desired pathway. The user of the system can define the area to constitute the pathway and cause people to walk in that pathway to reach an end-of-the-

line position, all in the absence of painted lines, and in the absence of the standard poles and ropes. In this case, there is a substrate having a plurality of spaced apart lines of path forming elements on the substrate, as well as an end-of-a-line position defined by an end-of-the-line element which extends between ends of the rows of path forming elements of the other where the individuals wait to advance to a destination.

Specifically, the appealed claims relate to that structure shown in Figure 1 of the drawings where there are path forming elements 24 and an end-of-the-line element 22, as well as a destination in advance of the end-of-the-line element 26. Please also see page 20, lines 16-26 of the Specification, and lines 1-11 of page 21.

VII.

ISSUES PRESENTED FOR CONSIDERATION

The following issues are presented for consideration:

- 1) Whether or not Claims 1-9 and 22-32 are patentable over the Hensler et al. patent in view of the Gehweiler et al. patent and the Chien patent under 35 USC 102.

- 2) Whether or not Claims 1-9 and 22-32 are patentable over the Hensler et al. patent in view of the Chien patent, the Gehweiler et al. patent, the Phillips patent, and the Schnee patent.

VIII.

GROUPINGS OF THE CLAIMS

The claims in the application stand or fall together. They would appear to constitute one group, as follows:

- 1) Claims 1-9 and 22-32 which are drawn to the basic guidance and location control system, and are believed to be patentable, since the prior art does not disclose this type of guidance and control system for the controlled movement of pedestrian individuals.

IX.

NON-MERIT REJECTIONS/OBJECTIONS

- A. The claims in the application were rejected in that each of the claims used the language to the effect that the system and the method controlled movement of individuals while advancing toward an end-of-a-line position so that they can reach a destination in advance of that end-of-

the-line position. The Examiner took the position that this language was confusing inasmuch as a position in advance of the end-of-the-line would be a position located before one reaches the end of the line, and not after one reaches the end of the line.

The applicant filed an Amendment After Final Rejection attempting to alter this language to recite that the destination was beyond the end of the line. However, the Examiner refused entry because the word "beyond", compared to the term "in advance of" raised new issues.

The applicant is at a complete loss to understand how terminology, such as "beyond" in place of "in advance of" generates a new issue which would require further searching and/or investigation. Nevertheless, because the refusal to enter the Amendment seemed so superfluous, at least to the applicant, no further amendments were made to attempt to obviate informalities, since they would also likely be refused entry. However, in the event of a finding of allowability of the claims, all such information will be corrected.

- B. Objection was made to Claims 31 and 32 on the basis of a failure to use consistent terminology. These are minor issues and can be readily corrected after any potential allowance of the application. The term "path forming member" was an improper antecedent and the claim should have been written and at least interpreted with the terminology "path forming element".
- C. The claims in the application were also rejected over the claims of the two earlier identified co-pending U.S. applications of the same applicants. The applicants can and will submit a Terminal Disclaimer to overcome the double patenting rejection upon the finding of allowable subject matter. The filing of a Terminal Disclaimer should obviate any objection with regard to double patenting.

X.

CITED PRIOR ART REFERENCES

The references cited relied upon the Examiner in the final rejection include:

Hensler et al. U.S. patent No. 5,637,378

Chien U.S. patent No. 5,775,016

Gehweiler et al. U.S. patent No. 3,453,660

Schnee U.S. patent No. 2,680,698

Phillips U.S. patent No. 4,080,087

Each are briefly described below:

Hensler et al. Patent No. 5,637,378:

The Hensler et al. patent No. 5,637,378 relates to a floor mat which has a phosphorous border. The patentee describes the purposes of the borders to make the mat edges visible in the event of a power failure. The mat is a generally rectangular mat having a center section and with a pair of borders extending along the mat for the full length thereof. No other design work appears.

Chien U.S. Patent No. 5,775,016:

The Chien U.S. patent No. 5,775,016 shows a structure which the patentee refers to as an illuminated safety guide. The most relevant portion of this reference, if at all, is that illustrated in Figure 6 of the drawings. In this case, it can be seen that there is a hallway with a plurality of doors and a door at the very end of that hallway bearing the sign "Exit". According to the patentee, the word "Exit" is printed on a device extending along the hallway adjacent to each of the vertically disposed walls having the doorways therein and set forth the word "Exit" along

with the direction of movement. The patentee also described numerous other versions of Exit signs. Another somewhat related version is shown in Figure 16 and an additional somewhat related version is shown in Figure 17 of Chien et al.

Gehweiler et al. U.S. patent No. 3,453,660:

The Gehweiler et al. U.S. patent No. 3,453,660 was primarily cited for the teaching of the marker in Figure 2. These circular vinyl markers 99 are adapted to be adhered by a pressure-sensitive adhesive to a so-called "belt" and beyond this limited teaching, the patent relates to machines for removing and applying adhesive markers to a liner.

Schnee U.S. Patent No. 2,680,698:

The Schnee U.S. patent No. 2,680,698 was cited to show a design of a plurality of mats in a connected arrangement, such as an intersection of a pair of walking paths.

Phillips U.S. Patent No. 4,080,087:

The Phillips U.S. patent No. 4,080,087 discloses a walkway, particularly designed for visually handicapped individuals. One of the principal advantages of the Phillips invention is that the visually handicapped person uses tactile information by sensing the presence of foot plates on a walkway surface. By sensing the foot plates, the visually handicapped individual can follow a predefined

path. Also, a visually handicapped individual can move his or her cane from side to side to engage and sense location of such plates and thereby determine that he or she is within the desired walkway. However, the plates are not trying to lead a visually handicapped individual to anything, but merely keep him or her from walking into a dangerous situation.

XI.

DISTINGUISHMENT OF CLAIMS DEALING WITH THE
BASIC GUIDANCE AND LOCATION SYSTEM FROM EACH OF
THE COPENDING RELATED PATENT APPLICATIONS NOW ON APPEAL

The claims in this present application Serial No. 10/633,480 filed August 1, 2003, differ from the claims of the two copending related patent applications, as follows:

- 1) The claims in this application call for, among other things, the fact that the substrate is relatively free of elements which would obstruct the prominence of the end-of-the-line element and the lines of path forming elements, the movement indicator elements, cooperating with the path forming elements to define the pathway of movement and the direction of movement.

- 2) The claims further call for the width of the pathway being sufficiently narrow, so that an individual will not be inclined to walk in front of an individual who precedes him. In contrast, Claims 1-9 presented in application Serial No. 10/635,871 do not define those limitations as they appear in this application Serial No. 10/633,480 dealing with the upper surface of the substrate being relatively free of elements which would obstruct the prominence of the end-of-the-line element and the guide forming elements, and the fact that the pathway is sufficiently narrow so that an individual is not inclined to walk in front of an individual preceding him or her.
- 3) The claims in this '480 patent application also distinguish over the claims in the copending '871 application for the same reason that they distinguish over the copending '934 application.

XII.

ARGUMENTS ON APPEAL

(1) Contrast with the Prior Art:

The present application relates primarily to a personnel guidance and location control system for moving a group of pedestrian individuals in an orderly and predetermined pathway to an end-of-a-line position, and, thereafter, to a destination in advance of or beyond that end-of-the-line position. As a simple example, if a group of individuals were waiting in a line to walk to a cashier's kiosk, or other location, or if a group of individuals were standing in a line at a pharmacy awaiting their turn to talk to the pharmacist or clerk, they would reach an end-of-a-line position well in front of, the position of the kiosk, in the first example, and the pharmacist or clerk in the second example. When the individual at the kiosk or pharmacy had finished their transaction, the next person at the front end of the line would move to that kiosk or pharmacist or clerk, which constitutes the destination.

Heretofore, the only ways in which individuals were guided in an organized or somewhat orderly path was with the use of painted lines on a ground surface, or, otherwise, the conventional poles and ropes arrangement. However, each of these systems brought

their own problems. In the case of the painted lines, it was virtually impossible to use that system in an indoors location where there is expensive floor coverings, such as carpets, or the like. In an external environment, the lines are quickly destroyed by weathering. With ropes and poles, it is necessary to constantly locate the polls and ropes each morning when an institution opens and bring some inside when the institution closes. Moreover, people tend to damage particularly the ropes necessitating replacement. Even more so, the ropes and poles do not always necessarily provide the needed organization, inasmuch as they are frequently inadvertently or unintentionally moved by parties waiting in the line.

The applicants have found a very unique, highly effective system for moving a large number of people in a defined pathway to an end-of-a-line position, and, thereafter, to a destination in advance of that end-of-the-line position.

The Examiners, over the years, in this and the two related applications, have cited myriads of U.S. patents in an attempt to anticipate or render obvious the claims regarding this aspect of the invention. They have relied upon references showing fire escape routes, traffic patterns for automobiles, and even an airplane runway having end of the runway lights and lights on the

side of the runway to alert the pilot if he or she is getting too close to the edge of the runway.

Applicants have successfully defended against the vast majority of these references, and, therefore, the Examiner has now relied upon a conventional floor mat, taken alone and in combination with another reference dealing with a fire escape route. This is the gravamen of the Examiner's rejection. In short, the Examiner has paid little or no attention to the fact that there must be some basis to combine the references cited, and, moreover, and more importantly, the fact that they must fully meet the claimed limitations these references cannot in some vague way suggest the obviousness of the invention.

(2) The prior Art Misses Critical Limitations in the Claims:

The Examiner rejects claims 1-4, 6, 7, 22-24, 26-28, 30 and 32 as being unpatentable over U.S. 5,637,378 to Hensler et al. in view of U.S. 5,775,016 to Chien and U.S. 3,453,660 to Gehweiler et al.

(3) Standard of Review:

This reviewing Board is required to review the Examiner's analysis of rejection to determine if the claim has been correctly construed as to the scope and meaning of each contested limitation. See Gechter v. Davidson, 116 F.3d 1454,

1457, 43 USPQ2d 1030, 1032 (Fed. Cir. 1997). Every limitation positively recited in a claim must be given effect in order to determine what subject matter that claim defines. In re Wilder, 429 F.2d 447, 450, 166 USPQ 545, 548 (CCPA 1970).

(4) Nonobvious and New Elements of the Claims:

Applicants assert that this application contains a unique, nonobvious "end of a line" element, which is not taught by any prior art. This element is yet more unique and nonobvious, due to the fact that its purpose is not to halt traffic flow indefinitely, but to provide a waiting area for persons to be conveyed, in an orderly, singular fashion, to a further point.

Applicants also assert that the guidance elements in the instant Application are unique in their ability to be easily altered. It is also urged that the prior art of record does not show a plurality of guidance elements arranged to form a pair of paths sufficiently narrow to guide a group of individuals.

The Examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a prima facie case of unpatentability. In re Oetiker, 977 F.2d 1443, 1445,

24 USPQ2d 1443, 1444 (Fed. Cir. 1992). Applicant asserts that the Examiner has not met the initial burden.

Applicant also asserts that the limitations set forth in the claim have not been given sufficient effect. Applicant asserts that, instead of giving the claim limitations proper effect, the Examiner has erroneously inferred that certain limitations are taught in the prior art, in order to arrive at its rejection.

The major rejection which has been advanced by the Examiner is that dealing with Claims 1-9, and 22-32, in which the claims were rejected under 35 USC 103 as being unpatentable over Hensler et al., in view of Chien, Gehweiler et al. and Phillips, taken also in combination with Schnee. In order to formulate this rejection, the Examiner relies upon a ground cover substrate, such as that shown by Hensler et al.

The courts have recognized that in order to defeat a patent, a prior publication must describe the invention in such full, clear and exact terms as to enable any person skilled in the art to which it relates to practice the invention without the exercise of inventive skill of his own and without assistance from the patent claimed to have been anticipated. Moreover, when attempting to combine references, the same court has recognized that with regard

to combining references in an attempt to support an attack on a patent under 35 USC, § 103, there must be positive evidence - a teaching or at least a suggestion in one or more of the references that such combining would be desirable thing to do. See, for example, Racal-Vadic, Inc. v. Universal Data Systems, D.C.N.AL (1980) 207 USPQ 902.

The courts have also recognized that "a finding which . . . picks out one element in one prior patent and another element in another prior patent is manifestly insufficient to deny patentability." See, for example, Lawrence v. The Gillette Company, et al., 203 USPQ 732 (USCA 9, 1979).

The rejection, based on the grounds of Hensler et al. patent and the Chien patent, in combination, and even with the Gehweiler patent, do not and cannot respond to the limitations in the claims. Specifically, the claims call for the spaced apart small, discrete elements which identify the lines of path forming elements. Even if the Hensler et al. patent disclosed the limitations relating to the discrete spaced apart small path forming elements, and that is a real stretch in Hensler et al., there is nothing which even remotely suggests the end-of-the-line element. It would be preposterous to contend the door or doorway is the end-of-the-line element. In an emergency escape, people are not going to wait,

they are going to exit rapidly. Finally, there is also nothing which suggests the use of the direction indicating elements.

(4) Hensler Does Not Teach Most of the Elements in the Claims:

The Examiner in relying upon Hensler et al., notes that Hensler teaches the following elements:

1. Floor mat (ground cover substrate) with an upper surface and borders (path forming guidance elements 16 and 18) for indicating a path therebetween.
2. The substrate having path forming guidance elements associated with the an upper surface thereon to form parallel pathway boundaries in a desired orientation, said upper surface of said substrate being relatively free of elements that would obstruct the prominence of the pathway, said pathway being visibly prominent, the path forming guidance members being arranged to be visible in low and high

light conditions, the pathway being visibly prominent and of a carpeting material.

The Examiner admits, however, as follows, that Hensler et al. does not teach of the following:

"(1) An end of line element being an elongated element with indicia; (2) said end of line element being associated with the substrate and the path forming guidance elements; (3) the discrete path forming members associated with the upper surface of the substrate, being on opposite sides of said substrate and perpendicular to the end of line element and being in a pair of rows and extending from ends of the path forming guidance elements; (4) the rows are of sufficiently narrow width defining a narrow pathway with respect to the group and that of a car; (5) a plurality of movement indicator elements on said pathway of movement between the spaced apart pathway boundaries and being presented in

such manner to depict the direction of movement in that pathway; (6) said movement indicator elements cooperating with the path forming members to present a desired pathway and a direction of movement to an end of a line position; (7) and to a destination in advance of that end of the line position;

In fact, the Abstract set forth on Hensler does not refer to *any* end of a line position or any of the other missing elements, describing the patented item as "Floor mats and methods for producing such mats having wear resistant phosphorescent borders that emit light after removal of ambient light. . ."

(5) Gehweiler Does Not Teach an "End-of-a-line" Element:

The Examiner relies upon Gehweiler to teach ". . . that die cut members are an alternative means for designating a walkway, as compared to the means of Hensler et al. and to allow retrofitting of previously made substrates in order to

save costs and in order to allow the user more selection in the type of substrate desired."

In contrast to the suggestions of the Examiner, there is nothing in the four corners of Gehweiler et al. to suggest that these die-cut members would be used as (1) guidance elements in a pathway; (2) located in spaced apart pairs to form rows of guidance elements; and (3) to cooperate with an end-of-a-line element located perpendicularly to the rows of guidance elements.

(6) Chien Does Not Teach the Missing Elements:

Chen describes "an illuminated safety guide. . .made up of a fixture including a housing and a super thin lighting element in the form of an electro-luminescent strip, a photo-luminescent panel, or a combination of an electro-luminescent strip and PL panel."

It is certainly true that such a strip could be placed at the end of a line, or for that matter, anywhere else. Chien certainly does not suggest such. However, the purpose of such an "end of a line" element as set forth in the instant Application, i.e., to hold and further organize persons to

convey them to a yet-further destination, is not described by Chien, taught by Chien, nor is it obvious from Chien.

Therefore, the Examiner's conclusion that, "It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Hensler et al. by including one or more of the ground signs of Chien on the substrate thereof, for the purpose of indicating the position of an exit relative to the substrate," is just not accurate. However, for the purposes of this Application, this conclusion is irrelevant, in that the unique use of the end of a line element, for example, as contemplated by the instant application, is not contained in any of the prior art, nor is it anticipated by the Examiner's analysis.

Without citing any prior art, one of the Examiners has stated: "It is very well known that substrates can be laid according to the needs or desires of the supplier or user in order (1) to draw attention to a change, or (2) to span a distance wherein the substrates are not of the correct length to fully span the distance where the ends of said substrates abut."

The Examiner then relies upon Chien to suggest an end of line element based upon the preferences or needs of a user. This most general statement does not describe the very specific use of the nature of the end of a line element set forth in the instant application, which is to hold and further organize persons to convey them to a yet-further destination. This use is entirely distinct from, and not suggested by, Chien.

(7) Schnee Does Not Deal with the Essence of the Invention:

The Examiner further relies upon the Schnee patent for the alleged teaching that elongate mats can be arranged in a desired orientation. With regard to the Schnee patent, there is also no teaching of small, discrete elements forming a defined pathway, and even more so, there is, again, no end-of-the-line element. The mats in Schnee can admittedly be assembled in a desired configuration. However, if they had an end of the line element, they would not teach of moving people to a destination in advance. The mats end with no further fanfare.

(8) Phillips is Remote:

The Examiner cites Phillips for the foot plates of Figures 1 and 2. They are not arranged so that they form a pair of spaced apart pathway forming lines. They are merely designed for tactile

engagement by a visually impaired individual. They do not teach of forming a pathway, but are a tactile line of elements for engagement by such visually handicapped individual to feel. Moreover, they are designed for permanent (non-moveable and non-relocatable) attachment to the ground-surface.

One cannot even argue that the footprints in Phillips are tantamount to a pathway. There are no boundaries for any such pathway. In the present invention, those boundaries are an important, if not critical element, in that they keep the individuals in an orderly and organized path to lead to an end-of-a-line position and then to a destination beyond that position. In any event, those boundaries are clearly missing in Phillips.

There is also no end-of-the-line element in Phillips. One could argue that the end of the foot prints represents the end of the line. However, if that be the case, there would be no destination beyond that end-of-the-line element. In short, there is no end-of-the-line element. Finally, there are no path forming elements which define those all-important boundaries of the pathway of movement. The claims specifically call for a plurality of path forming elements extending from said at least one element defining a pair of spaced apart boundaries of a pathway of movement. On this, Phillips is completely silent.

(9) There Has Been an Unjustified Wholesale Dismissal of Important Claim Limitations:

Although the claims in issue do not contain pure "means clauses", they are effectively written as a type of means clause by merely defining the element and the function of that element. This is not improper. The courts had held, and particularly in Stearns v. Trinker & Rasor, 252 F.2d 589 (9th Circ. 1957):

"While an element in a claim for a combination may be expressed as a means or step for performing a function without recital of structure, material or acts in support thereof; the structure, material, or acts must be described in the specification, and if so described, the claim will be construed to cover that which is described and the equivalents thereof. But the structure need not as well be recited in the claim." pp.597-598."

It has been held in Saf-Gard Products, Inc. v. Service Parts, Inc., 532 F.2d, at 1272:

"Also, the defendants' argument that mechanical engineering students would be able to analyze the Brunton shoring device is irrelevant."

This court, "has made it clear, moreover, that an invention will not be denied a patent because it embodies a solution which seems simple and obvious with the benefit of hindsight." Thus, even a minor change may produce a patentable invention, where the

result could not have been predicted beforehand by one skilled in the art."

It was also held that a finding which picks out one element in a prior art patent and another element in another prior art patent as a demonstration of anticipation is manifestly insufficient to overcome the presumption of validity arising from the issuance of a patent. Santa Fe-Pomeroy, Inc. v. P&Z Co., 569 F.2d 1094.

The heart of the matter, in fact, is the Examiner's characterization of the intended uses of the of item. The Examiner has stated that the intended uses have not been given any patentable weight since it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed is not a structural limitation.

The Examiner relies upon a single word in support of its analysis, to wit, the use of the "whereby" clause. The Examiner takes the position that the use of "whereby" makes what follows a functional limitation, and thus, does not have sufficient patentable weight, relying upon case laws to the effect that a the functional "whereby" statement does not define any structure and accordingly can not serve to distinguish.

The Examiner's error here is to characterize the instant application as being identical to the prior art, but merely utilized in a different manner. This is not the case. The Examiner has not pointed to a single piece of prior art that contains a "holding area," designed to retain persons, and direct them to a further point, in a controlled manner. This is not a difference in intended use. This is a structural limitation, and does not fall within the Masham analysis.

It becomes apparent that one of the crucial points in this rejection is that the Examiner contends the claims are replete with functional language, as opposed to structural language. The irony is that there are very few components necessary to use in the present invention. However, those components do co-act in a unique way to control individuals in an orderly, precise manner. If this is functional language, the references of record sure do not show this feature. In short, the Examiner seems all too ready to dismiss the claims on the grounds that the limitations are functional. The applicant has claimed all of the salient elements of the invention, and notwithstanding, the Examiner has not cited one reference or references in combination which even remotely suggest this system.

Limitations to the effect of rows of discrete elements forming a pathway are not functional, an end-of-the-line element is not functional, a destination in advance of the end-of-the-line element is not functional. A pathway of a size limited to preclude people from stepping in front of others is not functional, etc. The Examiner labels everything functional and then dismisses practically all of the limitations on the grounds that they are functional.

(10) It Is Apparent That the Examiner Is Not in Step with the Law:

Starting with Graham v. John Deere Co., 148 USPQ 466-467, the Supreme Court requires this Board to examine the scope and content of the prior art and determine the significance and important difference between the prior art and the claims at issue. This must be resolved against the level of ordinary skill in the art and against the background of the invention. This is a new invention. It has solved a problem, which has not heretofore been solved, and moreover, it has solved that problem in a very simple and straightforward way. (See also Sakraida v. Ag. Pro., Inc., 425 US 273.).

It is also the law that an inventor may obtain a valid patent on the basis of his seeing results unappreciated in the prior art.

Tilghman v. Proctor, 102 US 707, 26 L.Ed. 279 (1881). It is apparent that no one else has provided a system for guiding a group of individuals in a pathway to an end-of-a-line position and then a destination in advance of that end-of-the-line position. If such had existed, the Examiner would have at least cited one reference to this effect. None exists.

It was also noted, for example, in Molinaro v. Burnbaum, et al. 201 USPQ 83 (1977) that an ornamental hangar could be used as a Christmas tree ornament. It was also interesting to note that in that case the Court held that the invention itself cannot be used to provide hindsight in determining obviousness. In essence, that is what is happening in the present application.

The Examiner contends that the invention is now obvious in view of bits and pieces of other prior art references, without, in any fashion, showing how these references would provide a system of mats arranged in such manner as to guide a group of individuals in a desired pathway to an end-of-a-line position and then to a destination in advance of that end-of-the-line position. The Examiner merely takes the position that in some, unstated way, all of these bits and pieces of Hensler et al., Gehweiler et al., Chien, Phillips, and Schnee would all be combined to reach this unique result.

In the case of Colt Industries Operating Corporation v. Index-Werke KG, USDC 1979 (205 USPQ 990) the court held that:

"In deciding the question of obviousness under 35 USC § 103, it is not realistic to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such references fairly suggests to one of ordinary skill in the art. Application of Lunsford, 357 F.2d 380, 384, 148 USPQ 716, 719-720 (CCPA 1966); Title Council of America, Inc. v. Ceramic Tilers Supply, Inc., 257 F.Supp. 339, 341-42, 149 USPQ 398, 400-402 (S.D. Cal. 1965), aff'd 439 F.2d 1124, 169 USPQ 268 (9th Cir. 1971). Mere existence in the prior art of individual elements of a patented invention does not without more, invalidate the patent under 35 USC §103. There must be positive evidence that the bringing together of such elements would have been obvious to a person of ordinary skill in the art. As the Second Circuit has observed: "It would reduce patent protection almost to a nullity if an infringer could, in the light of a subsequent disclosure, comb the prior art and piece together portions of earlier patents, while dropping other parts, and thereby invalidate a new combination of old elements. Bragg-Kliesrath Corp. v. Farrell, 36 F.2d 845, 850 (d Cir. 1929)."

In short, the Examiner has taken Hensler et al. and uses the mat of this reference to suggest that because of florescent stripes, it will be obvious to combine the dots of Gehweiler et al. to form guidance paths. Gehweiler et al. is concerned with the making of these dots and suggests nothing about application to a

floor mat, much less a floor map having stripes along the sides. Gehweiler et al. is not even remotely concerned with forming guidance paths. Consequently, the Examiner's rejection must fail at this starting point.

It is noteworthy that the solution to a problem is simple, or appears so when viewed in retrospect. It does not mean that the solution was obvious at the time it was conceived. See for example, Ellipse Corp. v. Ford Motor Co., 452 F2d 163, 171 USPQ 31. To the contrary, it is evidence of invention. In any event, continuing with the rejection of the Examiner, the Examiner then applies Chien to show apparently the equivalent of an end-of-the-line element. In reality, there is no end-of-the-line element, and in fact, the Examiner has never once stated what in Chien constitutes the end-of-the-line element. Chien was merely applied in some vague fashion, presumably to suggest that maybe, somehow and with a little magic thrown in, there is an end-of-the-line element. The only thing that the applicants can determine from Chien is that there is a fire escape exit with a door. That is hardly the equivalent of an end-of-a-line element where people wait. People are going to use their utmost efforts to evacuate that building quickly in the event of a fire. They are not going to wait for anything.

It has also been held that it is not enough to invalidate a patent to show that separate elements exist in the prior art. The courts have recognized that "the key question is whether it would have been obvious to one of ordinary skill in the art to bring them together." See, for example, Wilden Pump & Engineering Co. v. Pressed & Welded Products Co., USDC (N.C.A.) 199 USPQ. 199 USPQ 390. See also, for example, United States v. Adams, 383 US 39, 148 USPQ 79 (1966), ITT v. Raychem Corp., 538 F.2d 453, 191 USPQ 1 (1 CIRC, 1976).

It becomes apparent that after seeing this invention, because the invention is simple, the Examiner concluded that it was obvious. As stated in Rohm and Haas Company v. Owens-Corning Fiberglass Corp., 196 USPQ 726, D.C.N.AL (1977):

"The courts have long recognized that many of the most important inventions appear simple and self-evident after they have been explained. But hindsight is recognized to be misleading and should not be relied upon to invalidate a patent, Diamond Rubber Co. v. Consolidated Tire, 220 U.S. 428, 435 (1911); Arnold Pipe Rentals Co. v. Engineering Enterprises, Inc., 350 F.2d 885, 890, 146, USPQ 415-416, 419-420 (5th Cir. 1965); Duo-Flex Corp. v. Building Service Co., supra, at pages 96-97, 138 USPQ 543.545."

See also, Molinaro v. Burnbaum, et al., supra, "the invention itself must not be used to provide hindsight in determine

obviousness." Reiner v. I Leon Co., Inc., 285 F.2d 501, 503-4, (128 USPQ 25).

(11) No Suggestion as to Combination:

As indicated previously, it is a long standing principle in the law, that the Examiner cannot find bits and pieces and merely suggest they can be combined. See, for example, Colt Industries v. Index-Werke, 205 USPO 990 (1979).

Yet, there is a serious issue as to whether or not there is even any suggestion as to a combination. Hensler does not disclose small, discrete elements, and even if Gehweiler did, one must wonder how those small, discrete elements in Gehweiler would find their way into the Hensler et al. mat. What is the suggestion to place those dots in the already blamed Hensler floor mat, other than to improve the aesthetics. Even more so, since there is no end-of-the-line element anywhere in any of the references, one must now wonder how the Examiner meets the limitations of these claims. In reality, the Examiner cannot meet these limitations.

It is interesting to note, that in large measure, the Examiner has taken bits and pieces from various divergent systems and made suggestions that, in some way or another, they can be combined. The Examiner does not have the luxury to merely pick and choose elements existing in the prior art without some basis for

combination. As another example, Hensler et al. discloses a floor map and Chien discloses an exit system for evacuating people from a hotel. The Examiner conveniently argues that there is a suggestion to combine. Nevertheless, exit systems of the type taught in, for example, Figure 6 of Chien are hardly combinable with floor mats.

It has long been held that "It is not enough to invalidate a patent to show that its separate elements exist in the prior art, the key question is whether it would have been obvious to one of ordinary skill in the art to bring them together." United States v. Adams 383 US 39 148 USPQ 479, as well as numerous cases as cited therein in support of this proposition.

In ITT v. Rey Chem Corp., 538 F.2d, 453, 191 USPQ 1 (1st Circ., 1976), the Court held that: It is not enough to invalidate a patent to show that its separate elements exist in the prior art, the key question is whether it would have been obvious to one of ordinary skill in the art to bring them together. The applicants again raised the question if it would have been so obvious, then why has not this system been proposed, or at least found in one reference? This fact alone demonstrates that it is a patentable invention. It is one thing to take a floor mat or an escape route in a hotel and combine them in some vague fashion to suggest they meet the

limitations of the claims. Even if they did, which is clearly not the case, it is patently obvious that this combination has not even remotely addressed the issue of guiding a large number of people in a defined pathway to an end-of-the-line position and a destination in advance of that position.

The Examiner has also missed other importation limitations. There is also nothing in the art of record which discloses the fact that the width of the pathway should be sufficiently narrow to preclude individuals from walking in front of one another. The Examiner dismisses these limitations on the grounds that the width is only considered to be an optimum value for the width of a pathway. This obvious answer effectively demonstrates that the Examiner has cited no reference showing, for example, at least this limitation.

The most salient point about this appeal is the fact that the Examiner has not found one reference, or any group of references in combination, which even remotely suggest the concept of guiding a group of pedestrian individuals in a pathway in an orderly and organized fashion and with a pathway designed to conform to an existing environment and to guide the pedestrian individuals in that pathway to an end-of-the-line position and then a destination beyond that end-of-the-line position. As indicated previously,

over the years, there have been a very large number of references cited and none deal with this basic concept. The Examiner would dismiss the basic concept of the present invention by finding bits and pieces of other references, as for example, floor mats, fire escape exit signs, airplane landing systems, and even automobile roadways, to suggest that they would define a way of guiding a group of pedestrian individuals. However, none suggest the formation of a pathway leading individuals in a path of limited width to an end-of-the-line position, and then, in an orderly manner, to a destination in advance of that end-of-the-line position.

(12) Commercial Success:

It must be recognized that this invention is not some problematic or fanciful anticipation. It is, indeed, a living reality. This system has been and is being used in numerous public institutions, as for example, airports, as for example, Burbank Airport, in California, various restaurants, such as, for example, MacDonald's restaurants, pharmacies, such as, for example, Sav-On Pharmacies, etc. Even if there is any doubt as to the patentability of this invention, and there should not be, it would seem that this success with respect to Claims 1-5 and 29-34.

The applicants in the parent patent application have submitted a Declaration of Use showing the success of the system. The reiterate systems of this type have been used in airports, as for example, Burbank Airport, in the Los Angeles area of California. They have been used by numerous pharmacies, particularly in view of the recent HIPPO laws in which privacy of patients must be recognized. Now, the pharmacy is able to keep patents in line from receiving information about the prescriptions given to their predecessor in line. The system of the invention completely satisfies that requirement. As a simple example, Sav-On Pharmacies, a national chain (by different names in different parts of the country) have been highly effective. This type of system has also found use in numerous other establishments. The declaration of the inventor has supported this position.

Even if there is any doubt as to the patentability of this invention, and there should not be, it would suggest that this commercial success with respect to the claims in issue should deem an allowance of the application. Gusmer v. Parker (DC.DC.) 206 USPQ 971.

It becomes apparent that this invention is not some problematic or fanciful anticipation. It is, indeed, a living reality. When the system is being used in public institutions, such

as airports, pharmacies, restaurants, and the like, it becomes more than merely a so-called "paper patent".

Finally, it is worth mention that in three different applications, albeit with similar subject matter, essentially the same prior art was applied and, moreover, was applied in essentially the same way. One would expect some variance in the decisions if truly independent. It becomes apparent that there was at least one guiding force in the negative results in all three applications. Therefore, it would be unfair to conclude that three independent Examiners operating independently from one another came to the same conclusion. Rather, it is apparent that some independent force guided the decisions in all three applications.

XII.

CONCLUSION

The Examiner has erred in numerous ways with every rejection in the instant application. Specifically, and at the outset, the Examiner the erred in dismissing limitations in the claims as being allegedly functional, and, essentially, overlooking the unique aspect of the invention. Secondly, the Examiner has attempted to pigeonhole the system of the invention into the form of a floor mat, and with that limited scope, adopted the limited thinking that

a floor mat is responsive to a plurality of mats designed to cause individuals to walk in a certain path to an end-of-the-line position and a destination beyond.

Thirdly, the Examiner has erred completely in applying the prior art and stretching the prior art well beyond its intended meanings. Finally, the Examiner has dismissed critical limitations in the claims by contending they are obvious with no basis of supporting that contention. In substance, when the Board reviews the distorted treatment in rejecting the claims, it is believed that an allowance will be compelled.

Dated: October 18, 2005

Respectfully submitted,



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APPENDIX A

A copy of the claims pursuant to 37 CFR 1.192(c)(9) is included in the Appendix.

Appended hereto are copies of Claims 1-9 and 22-32 on appeal.

A personnel guidance and location control system for guiding a group of walking pedestrian individuals into a line thereof and controlling movement thereof while advancing toward an end of a line position so that they may reach a destination in advance of that end of the line position, said guidance and location control system comprising:

- a) a ground cover substrate for disposition on a ground surface and having an upper surface thereon;
- b) at least one end of the line element associated with said upper surface of said cover substrate and in a fixed location thereon for defining an end of a line position for the group of walking pedestrian individuals and representing a waiting location on said upper surface for the individual at the front end of the line so that each of the individuals may reach that end of the line position and thereafter proceed to a destination in advance of the end of the line in an orderly and successive manner;
- c) a pair of discrete path forming guidance members associated with said upper surface of said cover substrate and on opposite sides of said substrate and in a fixed location thereon relative to the end of line element and extending from regions in proximity to opposite ends of the end of line

element initially generally perpendicular to the end of the line element to form parallel pathway boundaries in a desired orientation which define a pathway of movement for the group of individuals;

- d) a plurality of movement indicator elements on said pathway of movement between the spaced apart pathway boundaries and being presented in such manner to suggest that the individuals in the line walk in the pedestrian pathway and to depict the direction of movement in that pathway so that the individuals move to the end of the line position, said movement indicator elements cooperating with the path forming members to present a desired pathway and a direction of movement to an end of a line position and to a destination in advance of that end of the line position, said upper surface of said substrate being relatively free of elements which would obstruct the prominence of the end of the line element and the lines of path forming guidance members and the plurality of movement indicator elements so that the pathway is not visually obstructed, said pathway being visibly prominent so that the individuals desiring to reach a destination will be automatically induced to enter the pathway of movement in an orderly manner;

- e) the width of the pathway being sufficiently narrow so that individuals in the pathway will not be inclined to walk in front of an individual who precedes them providing for an orderly movement of the individuals to a destination in advance of the end of the line element and also in advance of the end of the pathway, the end of the line element being spaced from said destination so that there is no crowding of individuals at or around that destination;
- f) means associated with said end of line element and path forming members for locating same with the cover substrate, whereby the ground cover substrate and end of line element and path forming members associated with said substrate can appear on the upper surface of the ground cover substrate presenting a desired pattern to enable the orderly and controlled movement of a group of walking pedestrian individuals into one or more lines of same to a destination; and
- g) whereby the guidance and location system constitutes a complete and self-contained system which is sufficient to induce pedestrian personnel to enter into the pathway and to follow the pathway defined by the relatively confined path forming

members and which is a complete guidance and location control system immediately installable and relatively light in weight for easy transportability, said mat of said system also being usable in confined locations where other guidance and location control systems would not be adaptable and which also does not constitute an interference for unambulatory individuals allowing them to use the system and further does not constitute a visual obstruction, thereby effectively and efficiently controlling movement of a large number of pedestrian individuals.

2

The personnel guidance and location control system of Claim 1 further characterized in that the end of the line element is an elongate element and indicia is provided on the upper surface of the elongate element.

3

The personnel guidance and location control system of Claim 1 further characterized in that the means for locating comprises a fastening means associated with the underside of the end of line element and with the path forming members each comprising a plurality of path forming elements and the underside of the small

discrete path forming elements having means for securing same to said ground cover substrate.

4

The personnel guidance and location control system of Claim 3 further characterized in that the fastening means associated with the underside of the end of the line element and the small discrete path forming elements is an adhesive strip.

5

The personnel guidance and location control system of Claim 3 further characterized in that the fastening means associated with the underside of the end of the line element and the small discrete path forming elements is a downwardly projecting screw.

6

The personnel guidance and location control system of Claim 1 further characterized in that said end of the line element and the path forming members are fitted into recesses formed in the ground cover substrate for holding same and have surfaces at the surfaces of the substrate.

7

The personnel guidance and location control system of Claim 1 further characterized in that the substrate is a carpeting material

and the end of the line element and the path forming members are formed integrally in said substrate and appear at the upper surface of the substrate.

8

The personnel guidance and location control system of Claim 1 further characterized in that the end of the line element and the path forming members are painted onto said upper surface of said substrate.

9

The personnel guidance and location control system of Claim 1 comprising a plurality of said substrates, and means is associated with each of said substrates enabling said substrates to be arranged relative to one another with an end of one substrate abutted against or closely spaced to an end of a next adjacent substrate to form a desired orientation for that pathway and to remain in the desired pattern orientation and where the orientation of the pathway can account for and guide the pedestrian individuals to avoid fixed obstructions in the existing environment

A personnel guidance and location control system for guiding a group of pedestrian individuals into a pedestrian pathway and controlling movement thereof and to an activity at the end of that pathway, said guidance and location control system comprising:

- a) at least one ground cover substrate for disposition on a ground surface;
- b) at least one elongate element associated with said cover substrate for securement at a fixed location for defining an end of a line of the group of pedestrian individuals and representing a waiting location for the individual at the front end of the group of pedestrian individuals in the line and where each of the individuals may wait their turn at the elongate member until they are ready to be received at the destination, so that the individuals may proceed to the destination in advance of the front end of the line in an orderly and successive manner;
- c) a pair of rows of path forming members associated with said ground cover substrate in fixed locations relative to the elongate element and extending from opposite ends of the elongate element creating a pair of spaced apart pathway boundaries to define

the pedestrian pathway of movement for the group of individuals;

- d) said pathway being of a width sufficient to receive a line of individuals and arranged to guide the group of individuals to the end of the line position and being arranged to conform to an existing environment for optimum placement of a group of pedestrian individuals the pathway boundaries defining the boundaries of movement to the side for each of the individuals in the group allowing each of the individuals to await their turn in the pathway to reach the end of the line position and then leave that end of the line position for the destination in advance of but in proximity to the end of the line position;
- e) a plurality of movement indicator elements on said pathway between the spaced apart pathway boundaries and being presented in such manner to suggest that the individuals in the line walk in the pedestrian pathway and to depict the direction of movement in that pathway so that the individuals move to the end of the line position, said movement indicator elements cooperating with the path forming members to present a desired pathway and providing a direction of movement to an end of a line position

and to a destination in advance of that end of the line position;

- f) means associated with said elongate element and said path forming members for locating same with the ground cover substrate, whereby the ground cover substrate and elongate element and path forming members can be located on the ground surface and arranged in a desired orientation to conform to an existing environment so as to optimize use of pedestrian walking space in that existing environment, the small discrete elements thereby presenting a desired pattern to enable the orderly and controlled movement of a group of pedestrian individuals into one or more lines of same to a destination; and
- g) whereby the guidance and location control system constitutes a complete and self-contained system which is sufficient to induce pedestrian personnel to enter into the pathway and to follow the pathway defined by the relatively confined path forming members and which constitutes a complete guidance and location control system immediately installable and relatively light in weight for easy transportability, said mat of said system also being usable in confined locations where other

guidance and location control systems would not be adaptable and which also does not constitute an interference for unambulatory individuals allowing them to use the system and further does not constitute a visual obstruction, thereby effectively and efficiently controlling movement of a large number of pedestrian individuals.

23

The personnel guidance and location control system of Claim 22 further characterized in that said path forming members extend from regions in proximity to opposite ends of the elongate element and are arranged at a width less than the width of a conventional passenger automobile.

24

The personnel guidance and location control system of Claim 22 further characterized in that indicia is provided on the upper surface of the elongate element.

25

The personnel guidance and location control system of Claim 22 further characterized in that fastening means is associated with the underside of the elongate element and with the underside of the

path forming members, and that the fastening means comprises a downwardly projecting threaded member.

26

The personnel guidance and location control system of Claim 22 further characterized in that fastening means is associated with the underside of the elongate element and the path forming members, and that the fastening means is an adhesive strip.

27

The personnel guidance and location control system of Claim 22 further characterized in that said path forming members and elongate member and the pathway defined thereby being sufficiently low to said ground surface that they do not constitute barriers to individuals with ambulatory disabilities or in wheelchairs, such that wheelchairs can easily ride over the discrete members and the elongate member and individuals with ambulatory disabilities can readily walk over such path forming members and elongate member.

28

The personnel guidance and location control system of Claim 27 further characterized in that said pathway is also arranged to conform to an existing environment for optimum placement of the group of pedestrian individuals to maximize optimum use of space and to avoid pedestrian traffic congestion and which substrate and

the elements can be relocated to another position pursuant to need therefor.

29

The personnel guidance and location control system of Claim 27 further characterized in that said ground cover substrates have end margins on said substrates so that one substrate is capable of being arranged in abutting relationship with another substrate to form a desired pattern to thereby generate a selected pathway for the group of individuals.

30

The personnel guidance and location control system of Claim 27 further characterized in that said end of the line element is located on a substrate which is spaced slightly apart from an end of the other substrates to represent an end of the line position, but which is cooperatively located with respect to such other substrates to identify an end of the pathway.

31

The personnel guidance and location control system of Claim 22 further characterized in that the path forming members each comprise a plurality of small discrete path forming elements and extend from regions in proximity to opposite ends of the end of the line element.

A method for guiding a group of walking pedestrian individuals into a line thereof and controlling movement thereof while advancing toward an end of a line position so that they may reach a destination in advance of that end of the line position, said method comprising:

- a) providing a ground cover substrate for disposition on a ground surface and having an upper surface thereon;
- b) defining an end of a line position for the group of walking pedestrian individuals and representing a waiting location on said upper surface for the individual at the front end of the line so that each of the individuals may reach that end of the line position and thereafter proceed to a destination in advance of the end of the line in an orderly and successive manner by providing an end of the line element associated with said upper surface of said cover substrate and in a fixed location thereon;
- c) defining a pathway of movement for the pedestrian individuals and defining side margins of that pathway with a pair of discrete path forming guidance members on said upper surface of said cover substrate and on opposite sides of said

substrate and in a fixed location thereon relative to the end of line element and extending from regions in proximity to opposite ends of the end of line element and generally perpendicular to the end of the line element;

- d) a plurality of movement indicator elements on said pathway of movement between the spaced apart pathway boundaries and being presented in such manner to suggest that the individuals in the line walk in the pedestrian pathway with movement indicator elements cooperating with the path forming members to present a desired pathway and a direction of movement to the end of a line position;
- e) inducing the individuals to enter into said pathway by maintaining the pathway relatively free of elements which would obstruct the prominence of the end of the line element and the lines of path forming guidance members and the plurality of movement indicator elements and the plurality of movement indicator elements and by having said pathway visibly prominent;
- f) maintaining the width of the pathway sufficiently narrow so that individuals in the pathway will not be inclined to walk in front of an individual who

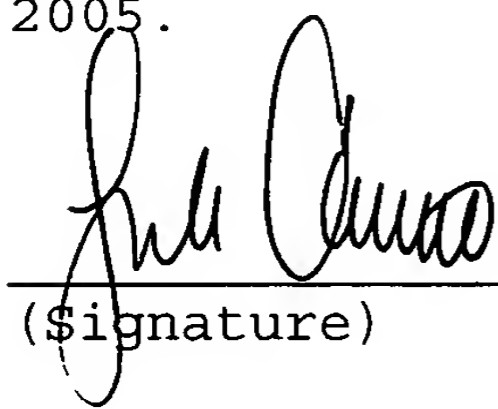
precedes them providing for an orderly movement of the individuals to a destination in advance of the end of the line element and also in advance of the end of the pathway;

- g) the end of the line element sufficiently from said destination so that there is no crowding of individuals at or around that destination; and
- h) whereby the method is complete and self-contained and sufficient to induce pedestrian personnel to enter into the pathway and to follow the pathway.

Daniel Pharo, et al.
Serial No. 10/633,480

CERTIFICATE OF MAILING

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